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NO. 88-155

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE STATE OF TEXAS,
Petitioner

vs.

GREGORY LEE JOHNSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE
TEXAS COURT OF CRIMINAL APPEALS

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QUESTION PRESENTED

1. DOES THE PUBLIC BURNING OF AN AMERICAN FLAG DURING THE COURSE OF A POLITICAL DEMONSTRATION CONSTITUTE FREE SPEECH SUBJECT TO THE PROTECTION OF THE FIRST AMENDMENT?

LIST OF PARTIES

GREGORY LEE JOHNSON,

Appellant below and Respondent herein

THE STATE OF TEXAS,

Appellee below and Petitioner herein

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE STATE OF TEXAS,
Petitioner

vs.

GREGORY LEE JOHNSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of the State of Texas entered in this proceeding on April 20, 1988, for which the State's motion for rehearing was denied on June 8, 1988. For clarity, reference to petitioner is by "State" or "Texas" and reference to respondent is by "Johnson."

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals, not yet reported, appears in the Appendix as Johnson v. State, No. 372-86 (Tex. Crim. App. April 20, 1988). The Appendix includes the majority opinion on Johnson's Petition for Discretionary Review to the Texas Court of Criminal Appeals as well as the dissenting opinion thereto. No opinion was issued on denial of the State's motion for rehearing on June 8, 1988. A copy of that order appears in the Appendix. Of interest is also the opinion of the intermediate court of appeals, upholding the constitutionality of the statute in question, which has been published as Johnson v. State, 706 S.W.2d 120 (Tex. App. -- Dallas 1986).

JURISDICTION

The opinion of the Court of Criminal Appeals was entered on April 20, 1988. On May 3, 1988, the State timely filed a motion for rehearing. That motion was overruled, without further opinion, on June 8, 1988.[1] This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST. amend. I, in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . .

U.S. CONST. amend. XIV, § 1, in relevant part:

> No state shall . . .deprive any person of life, liberty, or property, without due process of law.

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[1]An earlier motion for rehearing was filed on April 29, 1988, by the Texas State Prosecuting Attorney's Office; this motion was also overruled, without further opinion, on June 8, 1988. A copy of that order appears in the Appendix.

TEX. PENAL CODE ANN. § 42.09, in pertinent part:

> Desecration of a Venerated Object
>
> (a) A person commits an offense if he intentionally or knowingly desecrates:
> (3) a state or national flag.
> (b) For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.
> (c) An offense under this section is a Class A misdemeanor.

STATEMENT OF THE CASE

The facts of this case, surrounding an incident which occurred during the 1984 Republican National Convention in Dallas, Texas, are of some importance in resolving the issues presented by this

petition. The record[2] reflects that on August 22, 1984, Dallas Police Officer Terry Stover was assigned to infiltrate a planned demonstration being held in response to the convention. Officer Stover, acting undercover, joined a march called a "War Chest Tour" at Dealy Plaza in downtown Dallas and moved with the protesters as they marched through downtown Dallas. (R.II-58-59,60).

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[2] In accordance with the suggestions advanced in R. STERN, E. GRESSMAN and S. SHAPIRO, Supreme Court Practice, § 630 (6th ed. 1986), the State has not filed the record with this Court at this time. The statements made by the State and the record references advanced are essentially identical as those relied on by the State throughout the course of the appellate process and should come as no surprise to Johnson's attorneys. For convenience, the State has utilized the proper Texas citation form for a record in a criminal case as set forth in TEX. R. APP. P., Appendix for Criminal Cases, 1(a) and (b). The notation "R.I" refers to the transcript or volume containing papers filed with the trial court; "R.II" through "R.VI" refers to the five volumes of the statement of facts or court reporter's transcriptions.

During this march, Officer Stover noticed that Johnson and a woman, Denise Williams, appeared to be the leaders of this group as both encouraged the crowd by use of a megaphone. (R.II-80).

The protesters initially stopped at LTV Tower and traveled to the bottom floor, an area where shops were located. (R.II-71). At this point, the protesters conducted a "die-in," an event in which the protesters would count down from ten and then fall to the floor, moaning and yelling for approximately three to four minutes. (R.II-72). Apparently, this demonstration was designed to represent the force and effect of a nuclear bomb explosion. After conducting this "die-in," the marchers walked through Thanksgiving Square and entered the Republic Bank building. (R.II-73). At the Republic Bank building, the protesters seized and tore up deposit slips, pulled up potted plants and dumped the soil on the ground. (R.II-75).

The march then moved toward the Diamond Shamrock building. The management of this building, evidently knowing in advance of the march, caused the door of this building to be locked. Upon learning this, the protesters beat on the windows and spray-painted the walls and windows of the building. (R.II-76). The group then traveled to the Plaza of the Americas complex. Here, the marchers again overturned potted plants and spray-painted the floor. (R.II-79). The group then went by a skywalk to the Southland Life building. Various protesters spray-painted the floor and walls of the skywalk. (R.II-81). After another "die-in" at the park, the march moved toward the Mercantile National Bank building.

(R.II-82). There were three flag poles in front of this building, and one of them bore the American flag. Protesters bent all three poles; one protester took down the American flag and gave it to Johnson. (R.II-83-84). The protest march next moved to the Dallas Power & Light Company building, where the doors were locked. As they had done before, protesters spray-painted on the windows and beat against them with their fists. (R.II-85). A short time later, the marchers conducted another "die-in" in front of the Southwestern Bell building. During this "die-in," Officer Stover saw Johnson "shooting the finger" with both hands, saying, "Fuck you, America." (R.II-86-87). Indeed, as the march progressed, Officer Stover heard Johnson

shout such slogans as "Fuck you," "Fuck you, America," and "Fuck the Republicans." (RII-78).

After a stop at the Federal Reserve Building, where protesters again spray-painted and beat against the windows, the group ended up in front of Dallas City Hall. (R.II-87-88). There, Officer Stover saw the United States flag being burned while protesters chanted, "America, the red, white and blue, we spit on you." (R.II-91). Officer Stover testified that she was seriously offended by seeing the burning of the flag. (R.II-92). Officer Stover was not able to see who had burned the flag. (R.II-92).

Officer Roland Tucker, an investigator with the Dallas Police Department, was also assigned to infiltrate the march. (R.III-203-205). Officer Tucker actually witnessed the burning of the

flag in front of City Hall. According to Officer Tucker, a group of about 40 to 50 people encircled the flag. (R.III-216-217). Officer Tucker saw Denise Williams and Johnson holding both ends of the flag. Johnson attempted to light the flag with a cigarette lighter but was unable to do so. (R.III-218). Someone in the crowd then handed Johnson a container of lighter fluid. Johnson applied fluid to the flag on his next attempt and was able to set it on fire. (R.II-219). Officer Tucker was seriously offended by Johnson's actions. (R.III-222). Johnson was not immediately arrested at that time; a contingent of uniformed police did not arrive until about 30 to 45 minutes later. (R.II-250).

The charred fragments of the flag were collected by Daniel Walker, an employee of the United States Army Corps

of Engineers. (R.III-268). Members of the press corps, who were covering the protest march, asked Mr. Walker how he felt when he saw the flag being burned. Mr. Walker testified that he told these reporters:

> This was the first time that I ever saw the flag burning and I told them I felt what -- my feelings, as to I felt that it was -- it was an individual and corporate suicide. And they said, "What do you mean by 'corporate?'"
>
> And I said that in every society, those who try to destroy it will usually succeed in destroying themselves . . .

(R.III-273). Mr. Walker buried the remains of the flag in his backyard. (R.III-273-274).

Johnson did not testify in his own behalf in the guilt/innocence stage of the trial. Defense evidence was presented by three witnesses who had been observers of the march for the American

Civil Liberties Union. These witnesses basically testified that Johnson was not the person who burned the flag.

Johnson was convicted of violating TEX. PENAL CODE ANN. § 42.09(a)(3) (Vernon 1974) and was sentenced by a jury to one year's confinement in the Dallas County jail and assessed a fine of $2000. (R.I-2,3,52, 59). He appealed to the Court of Appeals for the Fifth District of Texas at Dallas which, on January 23, 1986, affirmed his conviction in a published opinion. Johnson v. State, 706 S.W.2d 120 (Tex. App. -- Dallas 1986).

Johnson filed a petition for discretionary review to the Texas Court of Criminal Appeals. That court granted review and, in a written opinion, a bare majority reversed the judgment of the intermediate appellate court and remanded the case to the trial court with instruc-

tions that the indictment be dismissed. Johnson v. State, No. 372-86 (Tex. Crim. App. April 20, 1988). In a 5-4 opinion, the court decided that § 42.09(a)(3) was unconstitutional as applied to Johnson.[3] The majority apparently concluded that Johnson could not be prosecuted for flag desecration since that act, when considered in the context in which it arose, constituted "symbolic speech." The court did not find that Johnson's First Amendment rights, if any, outweighed the State's interests -- preventing a breach of the peace and preserving the flag as a symbol of national unity -- in regulating

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[3]In footnote 6, App., p. 7, the Court of Criminal Appeals expressly noted that it was not addressing the constitutionality of the statute, either facially or as applied to Johnson, under Art. I § 8 of the Texas Constitution. Thus, this case is based solely on the First Amendment and federal law. No procedural questions under Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) are apparent.

this type of conduct; rather, the majority questioned the validity of those interests. The court also held that § 42.09 was overbroad. The court did not rule on Johnson's claim that the statute was void for vagueness on its face.

The federal questions presented in this case were initially raised in a pre-trial motion to quash the information. (R.I-15-18).[4] These grounds were

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[4]Johnson alleged that the statute was "too vague and indefinite in violation of the Constitution of the United States of America and of the State of Texas," "overbroad, punishing actions protected under the First Amendment . . .and the Constitution and laws . . .of Texas," and that the statute was unconstitutional as applied to him, "a protester," since the flagburning occurred "at a demonstration to protest the policies of the United States and the national administration, during the period of the national convention of the Republican Party in Dallas to nominate candidates for the Office of President and Vice-President of the United States, was a type of symbolic speech within the ambit of the free speech clause of the First Amendment to the Constitution of the United States." (R.I-16-17).

reiterated at the close of the State's case-in-chief and again at the close of all the evidence in a motion for an instructed verdict. (R.III-285-289; R.V-623-625). These grounds were reurged in Johnson's motion for new trial, amended motion for new trial, his original appeal to the court of appeals and in his petition for discretionary review to the Court of Criminal Appeals. Following the rendition of the opinion of the Court of Criminal Appeals, the State filed a motion for rehearing urging error in the court's treatment of these issues.

REASON FOR GRANTING THE WRIT

I.

THE TEXAS COURT OF CRIMINAL APPEALS HAS DECIDED AN IMPORTANT QUESTION OF LAW UNDER THE FIRST AMENDMENT

WHICH HAS NOT BEEN, BUT WHICH SHOULD BE, RESOLVED BY THIS COURT; SPECIFICALLY, WHETHER AN ACT OF FLAGBURNING, WHICH OCCURRED AT THE CLIMAX OF A TURBULENT, DESTRUCTIVE AND POTENTIALLY VIOLENT DEMONSTRATION DURING THE 1984 REPUBLICAN CONVENTION CONSTITUTES "SPEECH" ENTITLED TO FIRST AMENDMENT PROTECTION.

This case presents an issue specifically reserved by this Court in Spence v. Washington, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) and in Street v. New York, 394 U.S. 576,581, 489 S.Ct. 1354,1360,1361, 22 L.Ed.2d 572 (1969), i.e., whether flagburning constitutes "speech" entitled to First Amendment protection. As noted by the

Eleventh Circuit in the case of Monroe v. State Court of Fulton County, 739 F.2d 568,572 (11th Cir. 1984), this Court "has not ruled on the constitutionality of convictions for politically inspired destruction of the American Flag." The State would agree that this Court has never considered the constitutional viability of a statute proscribing flag burning. It is the State's position that the act of flagburning does not rise to the level of speech, or, in the alternative, if the act can be considered speech, Texas is vested with sufficient compelling state interests to justify minimal infringement of a flagburner's First Amendment rights.

First Amendment Considerations

The State recognizes that, at the heart of the First Amendment, is the "recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern." Hustler Magazine v. Falwell, 485 U.S. ___, 108 S.Ct. ___, 99 L.Ed.2d 41,49 (1988). This does not mean, however, that no restrictions are recognized. Indeed, this Court has held that a governmental entity, when acting to further legitimate ends of the community, may impose incidental burdens on free speech. Renton v. Playtime Theaters, Inc., 475 U.S. 41, 106 S.Ct. 925,928-929, 89 L.Ed.2d 29 (1986). A regulation that restrains speech on the basis of content will presumptively violate the First Amendment; "content neutral" time, place, and manner regulations, however, are acceptable so long as these regulations are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. Id., 106 S.Ct. at 928. A regulation is "content neutral" if it is "justified without reference to the content of the regulated speech." Id., 106 S.Ct. at 929 (quoting Virginia Pharmacy Board v. Virginia Citizens Consumer Counsel, Inc., 425 U.S. 748,771, 96 S.Ct. 1817,1830, 48 L.Ed.2d 346 (1976)).

United States v. Crosson, 462 F.2d 96 (9th Cir. 1972) is illuminating. That case, which analyzed an act of flag desecration prosecuted under 18 U.S.C. § 700, said as follows:

> Clearly, the restriction on Appellant's First Amendment freedoms is no greater than is essential to the furtherance of the national interest. She has not been deprived of a forum for expressing

her dissent, but rather denied the use of the flag for contemptuous physical destruction.

462 F.2d at 102.

O'Brien and Spence

The standards for flagburning cases were originally were set forth in United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1965). O'Brien was convicted of violating a federal statute proscribing destruction or mutilation of a selective service registration certificate, commonly known as a draft card, during an anti-war demonstration. Defendant argued that his act of burning his draft card was symbolic speech within the scope of the First Amendment as the burning occurred within the larger context of a demonstration against the

Vietnam war and the draft.[5] This Court, in rejecting defendant's argument, stated as follows:

> We cannot accept the view that apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is a constitutionally protected activity. This Court has held that when "speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitation on First Amendment freedoms.

88 S.Ct. at 1678-1679 (emphasis added).

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[5] It is interesting to note that O'Brien admitted to agents of the Federal Bureau of Investigation that he had burned his draft card "because of his beliefs, knowing that he was violating federal law." 88 S.Ct. at 1675.

This Court then stated that a governmental regulation would be sufficiently justified if 1) it is within the constitutional power of the government; 2) it furthers an important or substantial governmental interest; 3) if the governmental interest is unrelated to the suppression of free expression; and 4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. 88 S.Ct. at 1679. This Court found that the statute prohibiting the destruction of a draft card met all those requirements. This Court also held that O'Brien's conviction was for the non-communicative aspect of his conduct and nothing more. 88 S.Ct. at 1682.

The O'Brien test was refined in Spence v. Washington, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974). Spence was convicted under a Washington statute prohibiting improper use of the United States flag.[6] Spence displayed the flag from his window; superimposed on the flag in removable tape was a peace symbol. Spence testified that he displayed his privately owned flag in order to protest certain historical events of significance at the time, specifically, the United States invasion of Cambodia and the killing of students at Kent State University. Although Spence apparently intended to place the flag on public view, this Court noted that the record contained no evidence that anyone other than the arresting officers had observed

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[6]Spence was not charged under Washington's flag desecration statute. 94 S.Ct. at 2728.

the flag. 94 S.Ct. at 2729. This Court recognized the O'Brien test that not all varieties of activity can be labeled as speech simply because the actor intends to convey an idea. 94 S.Ct. at 2730. This Court held, however, that defendant's activity constituted a form of symbolic expression. 94 S.Ct. at 2730.

Spence rejected the asserted state interest in preventing a breach of the peace, because this Court perceived no evidence in the record of a breach of the peace. 94 S.Ct. at 2731. Apparently, defendant was able only to display the flag briefly before police officers discovered the act. Next, this Court rejected a claimed state interest in protecting the sensibilities of passers-by. 94 S.Ct. at 2731. Lastly, this Court considered Washington's interest in

protecting the United States flag as a symbol of national unity; this Court assumed, without deciding, the validity of this interest. 94 S.Ct. at 2731.

Spence established a two-part analysis for flag desecration cases. The appellate court must determine 1) whether the conduct is protected under the First Amendment and 2) whether, upon the record of the given case, the interests advanced by the State are so substantial as to justify infringement of a defendant's constitutional rights. Both the court of appeals and the Texas Court of Criminal Appeals applied Spence in deciding this case.

Flagburning Is Conduct

In the original appeal, the intermediate court of appeals found that Johnson's act of flagburning constituted

"symbolic speech" in that it was "intended to convey a particularized message . . .and that this message was very likely to be understand by those who viewed it."[7] Johnson v. State, 706 S.W.2d 120,123 (Tex. App. -- Dallas 1986); App., p. 8. The Court of Criminal Appeals, in its opinion, adopted this holding. App., pp. 9-10. For First Amendment purposes, the State questions this interpretation.

Johnson's actions in publicly burning a United States flag clearly constitute conduct which Texas may proscribe. The Texas legislature may prohibit overt physical acts that it deems offensive

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[7]In its brief to the court of appeals, the State challenged this view. After the issuance of the opinion, however, the State did not seek a rehearing on this finding. The question of whether or not Johnson's act constituted "symbolic speech" was not directly put in issue to the Court of Criminal Appeals. Rather, all parties assumed this standard.

and/or harmful to society; this is true even if some speech aspects are involved. Indeed, § 42.09 does not prohibit speech at all; rather, the prohibitions are directed solely to overt physical acts and are designed to prohibit only those acts involving physical mistreatment of flags and other specifically designated venerated objects.

This is particularly true in view of the fact that § 42.09 is "content neutral."[8] The act of flagburning is prohibited, regardless of the message that the actor seeks to convey. This premise was recognized in Joyce v. United State, 454 F.2d 971,989 (D.C. Cir. 1971), cert. denied, 405 U.S. 969, 92 S.Ct. 1188, 31 L.Ed.2d 242 (1972) wherein a

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[8]The fact that the statute is "content neutral" should further distinguish this case from Boos v. Barry, 485 U.S. ___, 108 S.Ct. ___, 99 L.Ed.2d 333 (1988); see discussion pp. 56-58.

federal circuit court, considering the constitutionality of the federal flag desecration statute,[9] 18 U.S.C. § 700, said: "The statute proscribes certain distinctive acts whether they are associated with any particular expression of views which may be popular or unpopular with any group or individual." Thus, whether the flag is burned out of an act of treason or patriotism, love or hate, satisfaction or dissatisfaction with any particular governmental personnel or policy, the physical act of burning the flag remains prohibited. This statute does not prohibit the "casting of contempt on the flag" nor does it prohibit "fighting words where the flag is concerned"; one can heap abuse on the flag

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[9]The constitutionality of this statute has never been addressed by this Court.

either verbally or in writing. It is only physical acts of mistreatment which § 42.09 proscribes.

Section 42.09 has as its goal the prevention of specific, non-verbal conduct. Burning a United States flag, while it may involve communicative aspects, may properly be prohibited. Texas has a right to regulate the non-speech aspects involved in burning a United States flag. Indeed, the public destruction by fire of a United States flag is exactly the type of conduct which is clearly prohibited under any construction which could be given § 42.09. This conclusion was apparently accepted by the Court of Criminal Appeals which did not expressly find the statute unconstitutionally vague on its face.

Flagburning As "Symbolic Speech"

The State recognizes that flag misuse was recognized as a form of expression in both the majority and dissenting opinions in Spence. Indeed, as previously noted, both the intermediate court of appeals, which affirmed Johnson's conviction, and the Court of Criminal Appeals, which reversed Johnson's conviction and ordered the indictment dismissed, agreed that Johnson's action in burning the flag was not one of "mindless nihilism" but rather constituted "symbolic speech."[10] As the court of appeals properly noted, however, this recognition does not ban all governmental regulation. Indeed, as Chief Justice Rehnquist wrote in his dissenting opinion to Spence v. Washington:

> This Court has long recognized . . .that some forms of expression are not entitled to any protection at all under the First Amendment, despite the fact that they could reasonably be thought protected under its literal language. The Court has further recognized that even protected speech may be subject to reasonable limitation when important countervailing interests are involved. Citizens are not completely free to commit perjury, to libel other citizens, to infringe copyrights, to incite riots, or to interfere unduly with passage through a public thoroughfare. The right of free speech, though precious, remains subject to reasonable accommodation to other valued interests.
>
> Since a State concededly may impose some limitations on speech directly, it would seem to follow a fortiori that a State may legislate to protect important state interests even though an incidental limitation on free speech results. Virtually any law enacted by a State, when viewed with sufficient ingenuity, could be thought to interfere with some citizens preferred means of expression. But no one would argue, I presume, that a State could not prevent the painting of public buildings simply because a particular class of protesters believed

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[10]As previously noted, the Court of Criminal Appeals did not make an independent analysis on this point, but adopted the finding of the Court of Appeals.

> their message would best be conveyed through that medium. Had appellant here chosen to tape his peace symbol to a federal courthouse, I have little doubt that he could be prosecuted under a statute properly drawn to protect public property.

94 S.Ct. at 2733-2734 (emphasis original; citation omitted). The interests asserted by Texas in this case to justify infringement of Johnson's First Amendment rights, if any, are 1) that Texas has a compelling interest in preventing a breach of the peace and 2) that Texas has a valid state interest in protecting the United States flag as a symbol of national unity.

Prevention of a Breach of the Peace

In discussing the State's interest in preventing a breach of the peace, the majority of the Texas Court of Criminal Appeals found that the protest, during which the flag was burned, did not lead

to actual violence, thus obviating the State's legitimate interest in preventing a breach of the peace.[11] The court created a standard not previously recognized by any court of which the State is aware: that actual violence must accompany an act of flagburning before that act may be proscribed. Clearly, this is not the law.

The State's interest in regulating an act of flagburning is not punishment of a breach of the peace but rather prevention of a breach of the peace. This interest has been recognized. Street v. New York, 394 U.S. 576,590-593, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969); Jones v. Wade, 479 F.2d 1176,1179 (5th Cir. 1973); Sutherland v. DeWulf, 323 F.Supp. 740,744

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[11]The court did recognize that a state may prevent breaches of the peace by limiting speech, but seemed to dismiss this as a legitimate state interest in the context of flag desecration. App., p. 11.

(S. D. Ill. 1971). See also Spence v. Washington, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974). Some cases which have discussed this interest have held that burning a flag, by itself, is so inherently inflammatory that the state may act to prevent breaches of the peace. Johnson, 706 S.W.2d at 123; Deeds v. State, 474 S.W.2d 718,721 (Tex. Crim. App. 1971);[12] See State v. Royal, 113 N.H. 224,305 A.2d 676,680 (1973); State v. Mitchell, 32 Ohio App. 2d 16, 288 N.E.2d 216,226 (1972); State v. Waterman, 190 N.W.2d 809,811-812 (Iowa 1971). Others

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[12]The State recognizes that the court, in its opinion, overrules Deeds. It should be noted that the court of appeals chose to follow the lines of cases exemplified by Deeds. That court was free to choose and, in fact, acted with propriety since Deeds was decided by a Texas court of last resort. The State asserts that this is the appropriate test. Even if analyzed under Monroe, however, there is adequate evidence to demonstrate imminent public unrest and justify Texas' interest in preventing a breach of the peace.

have found that evidence of imminent public unrest must be shown. Monroe v. State Court of Fulton County, 739 F.2d 568,575 (11th Cir. 1984);[13] United State ex rel. Radisch v. Criminal Court, 385 F.Supp. 165,180-182 (S.D. N. Y. 1974); Klein v. Rockingham County Superior Court, 367 F.Supp. 1146,1151-1153 (D. N.H. 1973), aff'd, 502 F.Supp. 789 (1st Cir. 1974); Crosson v. Silver, 319 F.Supp. 1084,1088 (D. Ariz. 1970); Hodsdon v. Buckson, 310 F.Supp. 528,535 (D. Del. 1970), rev'd on other grounds, 444 F.2d 533 (3rd Cir. 1971); People v. Vaughan, 183 Colo. 40, 514 P.2d 1318,1323 (1973); State v. Kool, 212 N.W.2d 518,521 (Iowa 1973); People v. Von Rosen, 13 Ill.2d 68, 147 N.E.2d 327,329 (1958). No

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[13]Even Monroe recognized that the State clearly has a valid interest in preventing a breach of the peace that might arise from certain acts of flag desecration. 739 F.2d at 575.

case which the State has found, however, mandates an actual breach of the peace. The most that is required is for the prosecuting authority to introduce sufficient evidence that demonstrates either the imminence of public unrest or a clear and present danger of a breach of the peace.

Ignored by the court in its opinion is evidence introduced at trial which clearly demonstrates a potential for a breach of the peace. The flagburning occurred during the 1984 Republican National Convention, a time of heightened public presence and media attention in downtown Dallas. Johnson, who was one of the leaders of the gang of protesters, attracted attention with an inflammatory march through the downtown Dallas area. During the course of this march, the protesters invaded several businesses,

damaged and destroyed chattels real and personal,[14] and chanted inflammatory slogans such as "Fuck you, America." The protest, which by this time had attracted a sizeable crowd, ended in front of Dallas City Hall. Several people in the immediate group surrounding the flag came up to spit on it. While the flag burned, some protesters chanted, "America, the

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[14]The record reflects that bank deposit slips were torn up, potted plants were uprooted, and the walls and windows of public buildings were spray-painted. (R.II-73-89). Indeed, the record shows that the flag burned was perhaps a flag stolen from a flag pole in front of the Mercantile National Bank building. (R.II-83-89).

red, white and blue, we spit on you." Moreover, the flagburning occurred on public property.[15]

This is a far cry from the admitted minimum risk of a breach of the peace in Spence, where the defendant briefly displayed an altered flag from his window. Indeed, it is precisely the sort of situation that Texas must be permitted to regulate. The situation was potentially explosive and inherently inflammatory.

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[15]The act of burning the flag took place in front of Dallas City Hall, undoubtedly a public place in an area "over which the State by necessity must have certain supervisory powers unrelated to expression." Spence v. Washington, 94 S.Ct. at 2730. The State's interest in preventing a breach of the peace for an action occurring on public property is clearly different from the State interest in Spence since Spence considered misuse of a flag which was displayed on private property.

Johnson's actions could well have been rewarded by immediate physical reaction from people opposed to his act or from people seriously offended by his act. It is merely fortuitous that no undue public disorder actually occurred since the evidence adduced at trial clearly demonstrated a potential for a breach of the peace.[16] By mandating actual violence, the Texas Court of Criminal Appeals has adopted a standard stricter than is warranted by First Amendment considerations.

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[16]The court itself, in footnote three in its opinion, App., p. 4, notes that a number of other demonstrators also burned a national flag of a foreign country that same day and this action led to a "physical brawl." This, in and of itself, should be sufficient to support the State's claim that it is a valid State interest to prohibit the burning of a national flag since that action may lead to a breach of the peace.

As a practical matter, the rule formulated by the Texas Court of Criminal Appeals by requiring actual, as opposed to potential, violence before the law enforcement apparatus can intervene to terminate the desecration of the American flag actually encourages breaches of the peace by those witnesses to the desecration who wish to see the desecrators punished. Thus, the Court of Criminal Appeals ruling is the spark which can ignite the tinder-box of human emotions created by such demonstrations.

The Flag As a Symbol of National Unity

In addressing the issue of national unity, the Texas Court of Criminal Appeals did not hold that Johnson's First Amendment rights, if any, outweighed Texas' interest in protecting the flag as a symbol of national unity. Rather, the

court questioned the validity of that interest. App., p. 16,20. The court also noted, correctly, that this Court has not specifically addressed this issue in the context of flag desecration. App., p. 17.

As previously noted, in Spence v. Washington, this Court did not specifically recognize the validity of the asserted state interest in protecting the United States flag as a symbol of national unity. Rather, this Court assumed it. Two facts unique to Spence, however, distinguish that case from Johnson's prosecution.

Initially, Washington did not assert an interest in protecting the flag as a symbol of national unity in lower courts, nor did Washington pursue the matter in arguments before this Court. 94 S.Ct. at 2731. Texas, in this case, has always

asserted that protection of the flag as a symbol of national unity is a legitimate state interest justifying infringement of Johnson's First Amendment rights, if any.

Secondly, defendant Spence was not charged under Washington's flag desecration statute, a distinction repeatedly noted by this Court; rather, defendant Spence was charged under Washington's misuse statute. 94 S.Ct. at 2728,2732. The underlying interests between flag desecration and misuse of a flag are different. The interest in protecting the flag as a symbol of our country was, in Spence, concerned mainly with prohibiting use of the flag in a commercial or political context in such a way that it would appear that the United States Government in some way endorsed the message conveyed by the actor. A different interest underlies flag desecration

statutes. In these statutes, a state seeks to prevent dilution of the flag as a symbol of national unity by its wanton destruction in a public context. This interest was noted in Spence as an interest in preventing the flag from losing its symbolic capability of mirroring the sentiments of all who view it. 94 S.Ct. 2732. In Spence, however, this Court stopped short of endorsing the right of a state to protect the flag as a symbol of national unity. This issue should now be squarely addressed.

The notion that a state has a valid and substantial interest in protecting the flag as a symbol of national unity is one which has found favor with a variety of jurists. See Spence v. Washington, 418 U.S. at 421, 94 S.Ct. at 2735 (Rehnquist, J., dissenting); Smith v. Goguen, 415 U.S. 566,587, 94 S.Ct.

1242,1254, 39 L.Ed.2d 605 (1974) (White, J., concurring); Street v. New York, 394 U.S. at 605, 89 S.Ct. at 1372 (Warren, C.J., dissenting), id., 394 U.S. at 615-617, 89 S.Ct. at 1377-78 (Fortas, J., dissenting); United States v. Crosson, 462 F.2d 96,101 (9th Cir. 1972); Bowles v. Jones, 758 F.2d 1479,1482 (11th Cir. 1985) (Kravitch, J., concurring); Monroe v. State Court of Fulton County, 517 F.Supp. 1023,1026 (N.D. Ga. 1983), rev'd, 739 F.2d 568 (11th Cir. 1984); Sutherland v. DeWulf, 323 F.Supp. 740,745 (S.D. Ill. 1971); Monroe v. State, 295 S.E.2d 512,514 (Ga. 1982); Deeds v. State, 474 S.W.2d at 720-721. See also, Halter v. Nebraska, 205 U.S. 34,43, 27 S.Ct. 419 (1907). As Justice White said in Smith v. Goguen, a prosecution for improper use of a flag:

> It is also a historical fact that flags, including our own, have played an important and useful role

> in human affairs. One need not explain fully a phenomenon to recognize its existence and on this case to concede that the flag is an important symbol of nationhood and unity, created by the nation and endowed with certain attributes . . .
>
> I would not question those statutes which proscribe mutilation, defacement, or burning of the flag or which otherwise protect its physical integrity, without regard to whether such conduct might provoke violence . . .there would seem to be little question about the power of Congress to forbid the mutilation of the Lincoln Memorial or to prevent overlaying it with words or other objects. The flag is itself a monument, subject to similar protection.

94 S.Ct. at 1254 (emphasis added). Additionally, the State finds the language contained in the Georgia Supreme Court's opinion in Monroe v. State particularly compelling:

> For over 200 years, the United States flag has played a significant role in the human affairs of the country. It is symbolic of the ideology of our nation. The flag is our representative symbol of the union of our states and the independence of our country. It is clear that the people of this state and of the other states of the Union have a

unique and compelling interest in protecting the flag as a symbol of our nation. What may not be as readily apparent is that the public interest lies in having a symbol to represent the nation. This symbol belongs collectively to the people of the various states. While it is true that a physical reproduction of this symbol in the form of red, white and blue cloth may be privately purchased and donned, that which the flag represents is not subject to private ownership. We recognize that the people of this state have a substantial interest in protecting the symbol; this interest extends to regulating conduct which seeks to destroy the symbol . . .

295 S.W.2d at 514 (emphasis added).

Additionally, the Court of Criminal Appeals had applied an inappropriate test with respect to the governmental interests in protecting the flag as a symbol of national unity. Citing to West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed.2d 1628 (1943), the court found that, in order for a state interest in promoting national unity to outweigh

Johnson's First Amendment rights, "it must be necessary to prevent 'grave and immediate danger' to that interest." App., p. 18.[17] The court reasoned that "government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol." App., p. 20. The court then said as follows:

> If the state has a legitimate interest in promoting a state-approved symbol of unity, that interest is not so compelling, as to essentially license the flags use for only the promotion of governmental status quo. In its brief, the State does not aver why the American flag is in such "grave and immediate danger" of losing the ability to arouse feelings of unity or patriotism such that Sec. 42.09(a)(3) is "essential" to prevent its devaluation into a meaning-

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[17]The court recognized that the interest asserted in Barnette -- a forced pledge of allegiance -- and the interest of Texas asserted herein are distinguishable. The court found, nevertheless, that the two goals were "sufficiently similar" so as to warrant application of the same test. App., p. 18.

> less piece of cloth. We do not believe that such a danger is present.

App., p. 20.

The Court of Criminal Appeals' reliance on the "clear and present danger test" is misplaced. No court has ever required such a test where the act involved is the total and wanton destruction of a United States flag by burning that flag. The rationale behind Barnette was that a state could not compel respect for the flag; while Texas may not have a legitimate interest in compelling respect for the United States flag, Texas does have a legitimate and substantial interest in protecting and preserving the United States flag as a symbol of national unity.

Texas contends that its interest in protecting the flag as a symbol of national unity is both substantial and

compelling. Texas is not attempting to limit Johnson's right to publicly express his dissent against the United States Government as part of any legitimate protest activities. Texas does seek to punish Johnson for trying to destroy the effectiveness of the flag as a symbol revered by the vast majority of Americans. Johnson has not been been denied a forum for expressing his dissent by virtue of the Texas statute; rather, he merely has been denied the use of the flag for physical destruction. The Texas legislature has deemed that the United States flag is a venerated object per se; nothing need be done to prove that the flag is a venerated object or that it is entitled to additional protection. The physical act of desecration itself should show sufficient "danger" to warrant governmental protection.

The Overbreadth Doctrine

The Court of Criminal Appeals, in overturning Johnson's conviction for flagburning, also misapplied the overbreadth analysis under the First Amendment. The overbreadth doctrine is a legal concept formulated by this Court which allows a defendant to challenge a criminal statute on its face as unconstitutionally overbroad if the statute "does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities" which are protected by the constitution. Thornhill v. Alabama, 310 U.S. 88,97, 60 S.Ct. 736,742, 84 L.Ed.2d 1093 (1940). In determining an overbreadth attack, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. Houston v.

Hill, ___ U.S. ___, 107 S.Ct. 2502, ___ L.Ed.2d ___ (1987) citing to Hoffman Estates v. The Flip Side, Hoffman Estates, Inc., 455 U.S. 489,494, 102 S.Ct. 1186,1191, 71 L.Ed.2d 362 (1982). The Court of Criminal Appeals never indulged in this analysis. If the court had attempted to answer this threshold question, it would have produced a different result.

Section 42.09 does not inhibit the exposition of ideas; rather, it bans conduct which is not protected by the First Amendment. There is no question under the facts of this case that Johnson's actions came within the prohibitions of § 42.09; the Texas rule has long been that the overbreadth doctrine does not apply where a defendant's acts are within the prohibited zone of a criminal statute. Smith v. State, 478 S.W.2d 518,520 (Tex.

Crim. App. 1972); Deeds v. State, 474 S.W.2d 718,722 (Tex. Crim. App. 1971).[18] The question of constitutional overbreadth should never have been reached.[19] See Judge Miller's dissent, App., p. 26.

Also in addressing the overbreadth challenge, the Court of Criminal Appeals questioned the language of the statute

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[18] In Deeds, the Court of Criminal Appeals, in addressing an overbreadth challenge to the predecessor statute of §42.09, held that the act of burning the flag in a public place "constitutes the type of hard-core conduct which would be prohibited under any construction we might give the statute." 474 S.W.2d at 722.

[19] This Court indicated in Broderick v. Oklahoma, 413 U.S. 601,613, 93 S.Ct. 2908,2916, 37 L.Ed.2d 830 (1973), that the overbreadth analysis should be used only as a "last resort." This the Court of Criminal Appeals clearly failed to do. Indeed, the court reached this result without discussing Johnson's attack on the statute as being facially vague. Moreover, the court reached this issue before reaching the jury argument ground for review. App., p. 22 n. 10.

mandating that "serious offense"[20] be given. The Court noted that limiting the crime to acts of flagburning likely to cause "serious offense" was a proper step toward narrowly tailoring the statute to Texas' interest. App., p. 12. The court found, however, that § 42.09(a)(3) was "so broad" that it might be used to "punish protected conduct which has no propensity to result in breaches of the peace" since "serious offense" will "not always result in a breach of the peace." App., p. 13.

The Court of Criminal Appeals' holding is inconsistent and, as previously discussed, establishes a standard not

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[20] It is also clear, from the evidence adduced at trial, that specific evidence was presented to show that others were "seriously offended" by Johnson's conduct in burning the American flag.

previously recognized by this Court, i.e., that an actual breach of the peace must ensue before the State may proscribe an act of flagburning. This is clearly well beyond the compelling state interest to prevent a breach of the peace recognized in Spence v. Washington. This Court has never held that an actual breach of the peace is necessary in order for the state's interest in this regard to arise.

An additional reason advanced for holding the statute overbroad by the Court of Criminal Appeals is that "[w]hen a statute which restricts speech is under attack for overbreadth, the existence of another legislative alternative which would further the goal of the challenged statute may be used to prove that the challenged statute is overbroad." App., p. 14. This " standard" is set forth without citation to any authority though

the court claims to be guided by Boos v. Barry, 485 U.S. ___, 108 S.Ct. ___, 99 L.Ed.2d 333 (1988). The court finds the statute overbroad because it relates to "breaches of the peace" which are generally prohibited by TEX. PENAL CODE ANN. § 42.01 (Vernon-1974), App., p. 30, the statute which proscribes disorderly conduct and essentially covers the "fighting words" exception to the First Amendment as set forth in Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed.2d 1031 (1942). See "Practice Commentary" to § 42.01; see also, Houston v. Hill, 107 S.Ct. at 2510 n. 10.

These sections are not in pari materia.[21] Section 42.01 does not proscribe the destruction of specific property designated by the legislature as a venerated object; § 42.09 does not proscribe "fighting words" or any other form of actual speech. Indeed, had Johnson been arrested for disorderly conducted under § 42.01, he would have had a legitimate argument that he should have been prosecuted under § 42.09 as

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[21] Quite recently, the Court of Criminal Appeals set forth a lengthy and scholarly discussion of Texas law relating to the doctrine of in pari materia in Cheney v. State, No. 1065-84 (Tex. Crim. App. June 29, 1988) (not yet published). Basically, if two statutes do not deal with the same subject matter, persons or purpose, they are not in pari materia and should each be construed separately in accordance with the plain wording of each statute.

that offense covers his conduct more specifically. TEX. GOV'T CODE ANN. § 311.026 (Vernon Pamp. 1988).

Additionally, the court's reliance on Boos v. Barry for the proposition that the existence of a "less restrictive alternative" can lead to constitutional overbreadth is inappropriate. Boos involved a prosecution under a District of Columbia municipal ordinance prohibiting, in part, the display of any sign that tended to bring a foreign government into "public odium" or "public disrepute" within 500 feet of a foreign embassy located within the District. This ordinance was compared with an analogous statute adopted by Congress -- 18 U.S.C. § 112(b)(2) -- which applies to diplomatic personnel outside of the District of Columbia. This Court noted that § 112 originally contained anti-picketing pro-

visions which were deleted in 1976, leaving only a prohibition against intimidating, coercing, threatening or harrassing a foreign official. This Court noted not only these discrepancies but also the fact that "the District of Columbia government has responded to the congressional request . . .by repealing" the municipal ordinance contingent on congressional action to extend 18 U.S.C. § 112(b)(2) to the District of Columbia. This Court then, "relying on congressional judgment in this delicate area," concluded that the availability of alternatives such as § 112 demonstrated that the display clause was not crafted with sufficient precision to withstand First Amendment scrutiny. In the State's opinion, the municipal ordinance was held to be not narrowly tailored not only since a less restrictive alternative was

readily available but also since that alternative was in the process of adoption.

This is not the situation with respect to the Texas statutes at issue. Section 42.01 covers a broad range of disorderly conduct, including fighting words, which tend to incite a breach of the peace. Section 42.09, on the other hand, deals with overt physical acts of desecration of certain venerated objects, specifically, for purposes of this prosecution, a flag of the United States. Desecration is specifically defined and limited under § 42.09 to certain enumerated actions. Thus, § 42.09 is narrowly tailored to fit a certain specified need; in this case, the prevention of flag desecration by publicly burning the flag in a way which is likely to seriously offend others. Section 42.01

does not address the same basic interest as § 42.09 and cannot be considered a "less restrictive alternative."

Summation

The fact that Johnson was a political protester does not cloak him with immunity from prosecution under § 42.09. Johnson's act of publicly burning a United States flag clearly constitutes conduct which is not entitled to First Amendment protection. Even assuming that Johnson's action may be considered "symbolic speech," Texas may properly proscribe these actions in order to prevent a breach of the peace and/or to preserve the flag as a symbol of national unity. These interests outweigh any First Amendment rights Johnson may have in this type of conduct.

CONCLUSION

It is respectfully submitted that, for the reasons outlined above, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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A P P E N D I X

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GREGORY LEE JOHNSON, Appellant
No. 372-86 v.
THE STATE OF TEXAS, Appellee

Petition for Discretionary Review from the Court of Appeals, Fifth Supreme Judicial District of Texas [Dallas County]

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

Appellant was convicted, after a jury trial, of desecration of a venerated object. V.T.C.A., Penal Code § 42.09(a)(3).[1] Punishment was assessed at

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1 Sec. 42.09 Desecration of Venerated Object.
(a) A person commits an offense if he intentionally or knowingly desecrates:. . .
(3) A state or national flag.
(b) For purposes of this section, "desecrate" means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offense one or more persons likely to observe or discover his action.

one year's confinement in the Dallas County Jail and a $2,000 fine. The Dallas Court of Appeals affirmed. Johnson v. State, 706 S.W.2d 120 (Tex. App. -- Dallas 1986). We granted the appellant's petition for discretionary review to determine (1) whether V.T.C.A. Penal Code, § 42.09(a)(3) violates Art. I, sec. 8 of the Texas Constitution or the First Amendment to the United States Constitution, and (2) whether the prosecutor's closing argument during the punishment phase of the trial denied appellant a fair trial.[2] We hold that the First Amendment to the U.S. Constitution obviates appellant's conviction under section 42.09(a)(3) and we will remand.

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[2]The reason review was granted is found in Tex. R. App. Pro. 200(c)(2 & 3).

Appellant was arrested during the Republican National Convention in Dallas on August 22, 1984. He was involved with a series of demonstrations against the policies of the Reagan Administration and the Republican Party. These protests culminated with a rally in front of the Dallas City Hall with the burning of an American flag and political chants. The record indicates that these demonstrations were not violent and that police officers and representatives of the news media were present. After the flag had been burned, a spectator gathered the remains for burial in his backyard.

Approximately 30-45 minutes later, more Dallas police arrived to arrest appellant and several other demonstrators.[3]

The Court of Appeals rejected appellant's claim that section 42.09 is impermissibly vague, holding that the statute gives adequate warning as to what conduct is prohibited. That court also found that appellant's conduct amounted to protected speech, within the meaning of the First Amendment, but, relying on Deeds v. State, 474 S.W.2d 718 (Tex.

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[3]On the same day as appellant's arrest, a number of demonstrators burned the national flag of a foreign country. This action lead to a physical brawl; nevertheless, no arrests under section 42.09 were made in connection with the incident.

Crim. App. 1971),[4] found that the State's

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[4]Today, Deeds, supra, is no longer adequate authority. Our holding in Deeds that former Article 152, Vernon's Ann. P.C. was consistent with the test for regulation of symbolic speech enunciated in U.S. v. O'Brien, 391 U.S. 367, 88 S.Ct. 2727, 41 L.Ed.2d 842 (1974). The Supreme Court reached this result because a State's interest in preserving the flag as a national symbol focuses on the communicative aspect of flag desecration, that of denigrating the nation and, specifically, the flag as its icon. Id. In addition, the Supreme Court's most recent pronouncement on overbreadth analysis in First Amendment contexts suggests that our refusal in Deeds to consider overbreadth is untenable today. See Boos v. Barry, 56 U.S.L.W. 4254, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (1988).

This Court's other major discussion of former article 152 occurred in Delorme v. State, 488 S.W.2d 808 (Tex. Crim. App. 1973). Like Deeds, the Delorme decision is of questionable value today. In addition to relying on Deeds, the Delorme opinion followed a number of cases from other jurisdictions. State v. Van Camp, 6 Conn. Cir. 609, 281 A.2d 584 (1971); Commonwealth v. Goguen, 279 N.E.2d 666 (Mass. 1972) (conviction later reversed as violative of the First Amendment sub. nom. Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974); State v. Kasnett, 30 Ohio App. 2d 77, 283 N.E.2d 636 (1972), rev'd 34 Ohio St. 2d 193, 297 N.E.2d 537 (1973). Of the cases expressly followed in Delorme, only Van Camp, supra, decided by an intermediate appellate court in Connecticut, has not been overturned by a higher court.

interest in regulating this symbolic speech outweighed appellant's First Amendment rights.[5]

In his petition for discretionary review, appellant reurges his arguments made in the Court of Appeals on the constitutionality of the statute under which

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[5]The Dallas court also rejected points of error concerning the admission of video tape depictions of extraneous misconduct by others, a jury instruction on the law of parties, admission of appellant's prior convictions, and the prosecutor's argument during the punishment phase of the trial. Although we granted review on the question concerning the jury argument, none of these points are relevant to our ultimate disposition of this case.

he was convicted.[6] This argument asserts vagueness and overbreadth as reasons declaring section 42.09 unconstitutional. The State asserts two interests in support of section 42.09(a)(3): (1) to prevent breaches of the peace and (2) to

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[6]In the Court of Appeals, appellant assigned eight separate points of error on the issue of free speech. Of these eight points, half were based exclusively on Texas law. The Court of Appeals grouped these eight points together and purportedly decided them on both state and federal grounds. Their analysis, however, depended completely on cases which applied only the federal constitution. Despite that court's claim to have disposed of the State law issues, those questions are yet to be decided.

When a Court of Appeals is presented with both state and federal bases for a proposition of constitutional law and fails to address the state law aspects of the question, this Court's procedure is to review the correctness of the Court of Appeals's application of federal law and then remand, if necessary, for a determination of the state law issues. McCambridge v. State, 712 S.W.2d 499, 501-02 n.9 (Tex. Crim. App. 1986). We will not, therefore, address article I, sec. 8 of the Texas Constitution in this opinion.

preserve the flag as a symbol of national unity and counters by restating the positions advanced by the Court of Appeals.

In analyzing a symbolic speech question, the proper methodology requires the reviewing court to first determine whether a defendant's acts fall within the First Amendment. See, e.g., Spence v. Washington 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974); Tinker v. Des Moines Community School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); Monroe v. State Court of Fulton Co., 739 F.2d 568 (11th Cir. 1984); c.f. United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). The Dallas court held that, by burning a flag, appellant "intended to convey a particularized message...and that this message was very likely to be understood by those who viewed it." Johnson, supra

at 123. There is no reason for us to reach a different conclusion. The United States Supreme Court has held a number of activities to be protected "speech." Spence, supra (affixing a peace symbol to a flag); Tinker, supra (wearing of black arm bands); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 632-34, 63 S.Ct. 1178, 87 L.Ed.2d 1628 (1943) (not saluting the flag being protected by the First Amendment's speech provision); c.f. O'Brien, supra (Court refusing to decide whether draft card burning is speech). Given the context in which appellant burned the flag, "it would have been difficult for the vast majority of citizens to miss the drift of appellant's point at the time that he made it." Spence, supra at 410. Conduct falls within the ambit of the First Amendment when the actor shows "an intent

to convey a particularized message...and in the surrounding circumstances the likelihood was great that the message would be understood by those viewed it." Id. at 410-11. Given the context of an organized demonstration, speeches, slogans, and the distribution of literature, anyone who observed appellant's act would have understood the message that appellant intended to convey. The act for which appellant was convicted was clearly "speech" contemplated by the First Amendment.

Falling within the umbrella of First Amendment protection will not shield speech from all government regulations. E.g., Metromedia, Inc. v. San Diego, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298

(1981); Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966). Therefore, we must undertake to weigh the interests which the State asserts in support of section 42.09(c)(3).

The first interest averred offered by the State is the prevention of breaches of the peace which would likely be attendant to acts of flag desecration. A State may prevent breaches of the peace by limiting speech. Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed.2d 1031 (1942); see also Ex parte Meckel, 87 Tex. Cr. R. 120, 220 S.W. 81 (1919). Legitimacy of a State interest, however, is not enough to bring the regulation of protected speech into compliance with First Amendment protection. The Supreme Court has repeatedly held

that restrictions on speech must be very carefully tailored to meet a state's legitimate interests.[7]

Limiting the criminalization of flag desecration to incidents where it is likely to cause "serious offense" is a proper step toward narrowly tailoring the statute to the State's interest. Still,

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[7] O'Brien, supra at 377 (A "government regulation is sufficiently justified . . .if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherence [sic] of that interest.") (all emphasis is the author's unless otherwise noted). Barnette, supra at 639 ("The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."). See also Boos v. Barry, 56 U.S.L.W. 4254, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (1988) (discussed infra at page 5).

section 42.09(a)(3) is so broad that it may be used to punish protected conduct which has no propensity to result in breaches of the peace. "Serious offense" does not always result in a breach of the peace. The protest in this case did not lead to violence. As with most other protests of this nature, police were present at the scene. A witness was obviously "seriously offended" by appellant's conduct because he gathered the burned flag and buried it at his home; nevertheless, though "seriously offended", this man was not moved to violence. "Serious offense" occurred, but there was no breach of peace nor does the record reflect that the situation was potentially explosive. One cannot equate "serious offense" with incitement to breach the peace.

When a statute which restricts speech is under attack for overbreadth, the existence of another legislative alternative which would further the goal of the challenged statute may be used to prove that the challenged statute is overbroad. Very recently, the Supreme Court decided a challenge to an ordinance in the District of Columbia. Boos v. Barry, 56 U.S.L.W. 4254, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (1988). The ordinance made it unlawful to, within 500 feet of a foreign embassy, display any sign that tends to bring the foreign government into "public odium or public disrepute." Noting that Congress had provided a less restrictive alternative, 18 U.S.C. § 112 (b)(2), which served the same interest as the challenged ordinance, the Court wrote:

> [W]e conclude that the availability of alternatives such as § 112 amply demonstrates that

> the display clause is not crafted with sufficient precision to withstand First Amendment scrutiny. It may serve an interest in protecting the dignity of foreign missions, but it is not narrowly tailored; a less restrictive alternative is readily available. Thus, even assuming for present purposes that the dignity interest is "compelling," we hold that the display clause of §22-1115 is inconsistent with the First Amendment.

Boos, supra 56 U.S.L.W. at 4259.

For example, section 42.01 of the penal code states:

> (a) A person commits an offense if he intentionally or knowingly:
>
> (1) uses abusive, indecent, profane, or vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace;
>
> (2) makes an offensive gesture or display in a public place, and the gesture or display tends to incite an immediate breach of the peace. . .

V.T.C.A. Penal Code, § 42.01 (emphasis added). The existence of a statutory scheme other than section 42.09 which addresses the same basic interest in a less restrictive manner indicates that the legislature is aware of and able to implement an alternative to the language of section 42.09. Section 42.01, like section 112 in Boos, proves that the challenged statute, as it relates to breaches of the peace, is too broad for First Amendment purposes.

The second interest asserted by the State is that of preserving the flag as a symbol of unity. In Spence, supra, the Court refused to decide the validity of a state's interest in preserving the flag as a national symbol. Id. at 413-14. Instead, the Court assumed arguendo the

validity of the interest, and held Washington's flag misuse statute to be unconstitutional. Id. at 414-15.[8] The Supreme Court specifically reserved judgment on the question of flag desecration. This indicates that precedent prior to Spence does not necessarily require rejecting the State's interest in preserving the flag as a symbol. There is some precedent, however, which seems to indicate the weight this interest might be given in a balancing process.

In Barnette, supra, the parents of a child complained of a West Virginia law requiring children to salute the flag and

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[8]Spence had been prosecuted for violating Washington's misuse statute. This statute forbade affixing any mark, word, picture, design, etc. to a flag. The State of Washington also criminalized flag desecration. This provision is in a separate section, however, and Spence was not charged with its violation. Id. at 406-07. The Court specifically reserved the question of protecting the flag as a symbol from desecration. Id. at 415.

recite the Pledge of Allegiance. Failure to comply resulted in suspension from school. The goal of the West Virginia statute was to promote national unity. In order for this interest to be sufficient to abridge activity protected by the First Amendment, it must be necessary to prevent "grave and immediate danger" to that interest.[9]

The interest asserted in Barnette is distinguishable from the State's desire to preserve the flag as a symbol of national unity. The two goals, however, are sufficiently similar that the Supreme Court's discussion of promoting national unity is relevant to our decision. Justice Jackson wrote:

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[9]See note 5, supra, for the full text of this standard.

> To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds. We can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of this substance is the right to differ as to things that touch the heart of the existing order.
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

Id. at 641-42. Recognizing that the right to differ is the centerpiece of our First Amendment freedoms, a government cannot mandate by fiat a feeling of unity

in its citizens. Therefore, that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it cannot mandate the status or feeling the symbol purports to present.

If the State has a legitimate interest in promoting a State approved symbol of unity, that interest is not so compelling as to essentially license the flag's use for only the promotion of governmental status quo. In its brief, the State does not aver why the American flag is in such "grave and immediate danger" of losing the ability to rouse feelings of unity or patriotism such that section 42.09(a)(3) is "essential" to prevent its devaluation into a meaningless piece of cloth. We do not believe such a danger is present. Because

Barnette, O'Brien, and Boos would require such a threat in order to to [sic] uphold violations of federal free speech guarantees, we must hold that the interest of providing a symbol of unity is inadequate to support section 42.09(a)(3).

We hold that section 42.09(a)(3) may not be used to punish acts of flag desecration when such conduct falls within the protections of the First Amendment. We express no view as to whether the State may prosecute acts of flag desecration which do not constitute speech under the First Amendment. Because of this holding, we will not reach the portions of the appellant's argument which challenge the facial validity of the statute on grounds of vagueness. This Court will not pass on the facial constitutionality of a statute unless it is absolutely necessary for the disposition of the

case. See generally Papachristou v. City of Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). Thus, our holding that the statute is unconstitutional as applied to this appellant renders a facial determination unnecessary. In addition, we need not reach appellant's contention concerning the prosecutor's jury argument in the punishment phase of the trial.[10]

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[10]It may appear anomalous that we have decided the constitutionality of the section 42.09(a)(3), as applied, before reaching the jury argument ground for review. It should be noted that this alleged error occurred during the punishment phase of the trial. A reversal on this point would not affect the validity of appellant's conviction. Instead, it would merely result in a remand to the trial court for a new hearing on punishment. Art. 44.29(b) V.A.C.C.P. Thus, a complete disposition of this case requires us to first decide the validity of the conviction and then to proceed, if necessary, to punishment.

The judgments of the Court of Appeals and the trial court are reversed and the cause is remanded to the trial court for dismissal of the information.

CAMPBELL, J.

Delivered April 20, 1988

En Banc

Publish

P.J. Onion and J. Davis dissent for the reason that they believe the Court of Appeals was correct.

J. McCormick dissents.

GREGORY LEE JOHNSON, Appellant
No. 372-86 v.
THE STATE OF TEXAS, Appellee

Petition for Discretionary Review from the Court of Appeals, Fifth Supreme Judicial District of Texas [Dallas County]

DISSENTING OPINION

I do not agree with the majority that the State's interest in providing the flag as a symbol of unity is inadequate to support Sec. 42.09(a)3), V.A.P.C. I find the discussion of the symbolism of the flag in this Court's unanimous opinion in Deeds v. State, 474 S.W.2d 718 (Tex. Crim. App. 1972), both viable and highly persuasive, and I would apply the rationale of that case to the present cause.

In Deeds, supra, we held that the State had a right to regulate the non-speech aspect of the burning of the flag of the United States v. O'Brien, 391 U.S.

367 (1968). In considering the Deeds discussion about our national flag and the facts of this flag desecration case, I believe the regulation of appellant's nonverbal conduct, albeit admittedly symbolic speech, under Sec. 42.09(a)(3) is justified. The valid State interest of preserving the flag as a symbol of national unity clearly, in my view, supersedes whatever first amendment rights this appellant sought to assert. See dissenting opinions of chief Justice Warren and Justices Black, Fortas, and White, in Street v. New York, 394 U.S. 604 (1969); Halter v. Nebraska, 205 U.S. 34 (1907). As noted in Deeds, supra:

> "Since the flag symbolizes the entire nation, not just one particular political philosophy, the state may determine that it be kept above the turmoil created by competing ideologies." (emphasis supplied)

Though it may not pass muster in other fact situations or under other statutes, see e.g. Smith v. Goguen, 415 U.S. 556 (1973), Sec. 42.09, supra, passes constitutional muster in its application to destroying a United States flag, even as an exercise of "speech", in a manner "the actor knows will seriously offend" persons observing the action. Section 42.09, supra, is here being narrowly applied to a fact situation involving total destruction of the United States' national symbol. I do not agree that the statute is unconstitutional as applied to appellant or that he has grounds to make such challenge. Cf. Briggs v. State, 740 S.W.2d 803 (Tex. Crim. App. 1987) (defendant must show that statute is unconstitutional as applied to him in his situation).

I dissent.

Miller, Judge

En Banc

Publish

Delivered: 4/20/88

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

June 8, 1988
COA#: 05-85-00318-CR

RE: Case No. 0372-86
STYLE: Johnson, Gregory Lee

On this day the State's Motion for Rehearing was denied.
PRESIDING JUDGE ONION & JUDGES DAVIS, MCCORMICK & MILLER WOULD GRANT

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: John C. Vance
Crim Dist Attorney
County Courthouse
Dallas, TX 75202

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June 8, 1988
COA#: 05-85-00318-CR

RE: Case No. 0372-86
STYLE: Johnson, Gregory Lee

On this day the State's Motion for Rehearing filed by the State Prosecuting Attorney was denied.
PRESIDING JUDGE ONION & JUDGES DAVIS, MCCORMICK & MILLER WOULD GRANT

Thomas Lowe, Clerk

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MAIL TO: John C. Vance
Crim Dist Attorney
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Dallas, TX 75202

TEX. PENAL CODE § 42.01 **Disorderly Conduct**

(a) A person commits an offense if he intentionally or knowingly:

(1) uses abusive,indecent, profane, or vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace;

(2) makes an offensiv: gesture or display in a public place,and the gesture or display tends to incite an immediate breach of the peace;

(3) creates, by chemical means, a noxious and unreasonable odor in a public place;

(4) abuses or threatens a person in a public place in an obviously offensive manner;

(5) makes unreasonable noise in a public place or in or near a private residence that he has no right to occupy;

(6) fights with another in a public place;

(7) enters on the property of another and for a lewd or unlawful purpose looks into a dwelling on the property through any window or other opening in the dwelling;

(8) while on the premises of a hotel or comparable establishment, for a lewd or unlawful purpose looks into a guest room not his own through a window or other opening in the room;

(9) discharges a firearm in a public road;

(10) displays a firearm or other deadly weapon in a public place in a manner calculated to alarm;

(11) discharges a firearm on or across a public road; or

(12) exposes his anus or genitals in a public place and is reckless about whether another may be present who will be offended or alarmed by his act.

(b) It is a defense to prosecution under Subsection (a)(4) of this section that the actor had significant provocation for his abusive or threatening conduct.

(c) For purpose of this section, an act is deemed to occur in a public place or near a private residence if it produces its offensive or proscribed consequences in the public place or near a private residence.

(d) An offense under this section is a Class C misdemeanor unless committed under Subsection (a)(9) or (a)(10) of this section, in which event it is a Class B misdemeanor; and further provide that a person who violates Subsection (a)(11) is guilty of a misdemeanor and on a first conviction is punishable by a fine of not less than $25 nor more than $200, on a second conviction is punishable by a fine of not less than $200 nor more than $500, and on a third or subsequent conviction is punishable by a fine of $500.